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IN THE

Supreme Court of the United States

October Term, 1946.

No. 1072

E. E. SWALLEY,
Petitioner,

vs.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SWALLEY PRINTING CO., BIRMINGHAM 8, ALA.

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IN THE

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No.

E. E. SWALLEY, *Petitioner and Appellee below,*

vs.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION,
Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the judgment of that Court (per Minton, J.) entered in this case on October 31, 1946 (R. 376), reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division (per Igoe, J.) in favor of the Plaintiff-Petitioner E. E. Swalley in the sum of $77,328.65 and remanding the cause to the District Court for proceedings in accordance with the opinion of the Circuit Court of Appeals.

A petition for rehearing was filed by Petitioner Swalley in the Circuit Court of Appeals, with leave of the Court, on November 22, 1946 (R. 386), and was denied by the Court on November 29, 1946 (R. 386).

A certified transcript of the record in this case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

SUMMARY STATEMENT OF MATTERS INVOLVED

This is an action to recover commissions due under a written contract between the parties hereto, effective March 6th, 1941, wherein Plaintiff-Petitioner E. E. Swalley was appointed exclusive sales agent of the Multigraph Division of the Defendant-Respondent Company for the entire State of Alabama and certain Counties in the State of Florida.

The written contract is a printed form contract that was prepared by the Defendant Company, and the Plaintiff Swalley did not participate in drafting it (R. 16, par. 6).

The controlling provision of the contract is paragraph 8 (R. 248), which reads as follows:

"Commission on Sales in Other Territories:

8. Sales Agent shall not enter any territory other than hereinabove specified, for the purpose of selling the products of Company for use either within or outside of the above specified territory without first securing consent in writing of Sales Agent in said other territory, or of Company. On orders for machines or attachments, with or without supplies, secured by Sales Agent in the above territory for use in other than the above specified territory, Sales Agent shall receive 25% of the total commission to be paid on any such sales. When under like circumstances any other authorized Sales Agent of Company shall sell machines or attachments, with or without supplies, to be used in the territory specified in this contract, Sales Agent under this contract shall receive 75% of the authorized commis-

sion to be paid on any such sales. In the event that new or used equipment is transferred from one territory to another within ninety (90) days from date of shipment by Sales Agent or Company, the commission on such equipment, including supplies specified on original order, shall be readjusted on a basis of 75% of total commission to Sales Agent in whose territory the equipment was transferred, and 25% of total commission to Sales Agent who made the sale. On orders for or sales of supplies only, total commission will be paid to Sales Agent in whose territory the supplies are to be used, except that this does not apply to re-shipment of supplies by a customer to its subsidiaries or branches. These commissions stated in Clause 8, are to be subject to the same liability to be charged back against Sales Agent's account in case of non-payment by the purchaser, as in other cases specified in Clause 6 of this Contract."

The terms "use", "for use", and "to be used" are not defined in the contract, nor does the contract mention the word "storage" or seek to draw any distinction between "use" and "storage".

The Commission Schedule of the contract (R. 241) provided for a commission of 35% on the sale of machines and attachments of the types involved in this suit.

Paragraph 5 of the contract provided that commissions will be credited to the agent's commission account on the Company's books when shipment of goods is made. (R. 247).

The closing paragraph of the contract (R. 253-254) provided as follows:

"(a) This contract may be terminated at any time at the option of either party by and upon the giving of written notice addressed to and mailed, or delivered to the last known address of the other party; further that Company at any time may alter and change the

boundaries of the territory covered by this contract.

(b) This contract shall become binding upon the signature of Addressograph-Multigraph Corporation, Multigraph Division being thereto attached at Euclid Post Office, Cleveland, Ohio and said contract shall be deemed and held by the parties hereto as executed under and to be construed, governed and interpreted pursuant to the laws of the State of Ohio.

(c) This contract covers and contains any and all agreements between Sales Agent and Company, all other contracts or promises of any kind, either written or verbal, being hereby annulled and cancelled, and this contract shall not be varied or added to in any manner except in writing signed by the duly authorized officer of Company."

The Company's Sales Agent, Gray, at Dayton, Ohio, procured three (3) purchase orders from the Air Corps for machines and attachments, in accordance with the Company's formal proposal, said orders being numbered and dated as follows:

Order No. (535) 42-15979 dated March 31, 1942

Order No. (535) 42-19531-P dated May 18, 1942

Order No. (535) 42-19532-P dated May 20, 1942 (R. 281, 289, 295)

These purchase orders were embodied in standard Government contract forms, designated as War Department Air Corps Form No. 98.

The first order covered Multigraph and Multilith nonportable, duplicating machines, and contained a monthly delivery schedule requiring that delivery of all items shall begin on or before July 1st, 1942 and shall be completed by June 30th, 1943 (R. 285). The other two orders covered attachments for use with the machines listed in the first order, and directed that they should be delivered with the machines (R. 293-297).

Each of said orders contained shipping instructions specifically directing that a certain number of the machines and attachments be consigned to Mobile Air Depot, Mobile, Alabama, which was included in the exclusive territory of Plaintiff Swalley (R. 287, 291, and 297), and each item was required to be labeled "Property Air Force United States Army (R. 287, 295). The orders did not specify what use was to be made of the machines. After the machines were shipped the Defendant Company had no control over them (R. 326, 22).

Prior to the purchase orders in question, the parties had adopted a practical construction of the contract whereby paragraph 8 was construed to mean that where machines were sold by Agent A for shipment into Agent B's territory, Agent A was entitled to receive 25% of the 35% commission and Agent B was entitled to receive 75% of the commission, the commissions being paid or credited to the agents at the time of shipment; that this arrangement was subject, however, to a **condition subsequent**, viz., that in the event that the machines that were shipped into Agent B's territory were later transferred to Agent C's territory **within ninety days** from date of shipment, there would be a **readjustment** of the commission which had already been paid or credited to Agent B and that the commission would be split between Agent A and Agent C on a 25-75% basis; that this **condition subsequent** would not become operative to divest Agent B of his commission **unless and until** the machines were transferred out of his territory **within ninety days, and that if they remained in his territory for a period of ninety days, even if they were merely stored and were not actually used during that period, the condition subsequent would not become operative and Agent B would not be divested of his split commission.** (R. 265-266,259-260).

Both parties acted in reliance upon this interpretation of the contract, and this interpretation was in force and in effect not only at the time that the purchase orders in question were accepted by the company, but also continued to be given force and effect after the company had already made substantial deliveries pursuant to the purchase orders, and until the present controversy arose.

In the present suit Defendant Company admitted (R. 24) that the agency contract entitled Plaintiff Swalley to commissions on all machines shipped "for storage" (this is the Company's version) into the Mobile Air Depot, pursuant to the Air Corps contracts in question, which were subsequently installed and "used," but contended that he is not entitled to commissions on those machines which were not installed and "used." The Defendant Company **failed** to offer any proof, however, from the records in its possession (R. 191), that any of the machines or attachments in suit had been re-shipped out of Plaintiff Swalley's territory within 90 days; that is, the Company **failed** to prove that the split commissions that had accrued to Swalley at the time of the purchase contracts had become divested by operation of the condition subsequent of the 90-day clause of Paragraph 8 (R. 248).

The case was tried without a jury. (R. 50).

The District Court found, as a matter of fact (R. 328), that the machines and attachments shipped to the Mobile Air Depot pursuant to the three purchase orders in question remained in Plaintiff Swalley's territory more than ninety days beyond the date of delivery, and so far as the record shows, are still there, and that the Defendant Company has not paid any agent any commissions upon the same, except the commission of 25% of the total 35% commission provided for in the Dayton Agent's Contract, which was identical in terms with Swalley's Contract, and except for the

sum of $6,324.94 paid to the Plaintiff Swalley.

The District Court further found, as a matter of fact (R. 329), that the Defendant Company had received from the War Department the total sum of $291,899.87 under the three purchase orders, and that the full 35% commission amounted to the sum of $102,164.95. The Court concluded that Plaintiff Swalley is entitled to recover 75% of the full commission, which amounts to the sum of $77,328.65, after allowing proper credits and adding interest.

The District Court (per Igoe, J.) pointed out that the word "use" was not given a restricted meaning in the agency contract prepared by the Defendant Company; that there is no mention of "storage" in the contract; that the Air Corps purchase orders do not specify the intended use of the machines; that when the machines were delivered to the Air Corps, the Defendant Company divested itself completely of all ownership and control over same, and the Air Corps became vested with legal title and could make such use of the machines as it saw fit, and, if it so desired, could use the machines for the purpose of maintaining a liberal inventory in the Mobile Air Depot (R. 326-327).

The District Court further pointed out that any other interpretation would be unreasonable because an agent in Swalley's position would thereby be deprived of his commissions altogether, notwithstanding the fact that the selling agent had already received his share of the split commission under an identical agency contract.

On appeal by the Defendant Company, the Circuit Court of Appeals (per Minton, J.), completely disregarding the practical construction of the contract by the parties themselves (Record 265-266, 259-269), held, on the basis of certain dictionary definitions and tax cases, that the word "use", as employed in the contract drafted by the Defendant Company, should be interpreted in the Company's favor, to

exclude "storage". The Court also proceeded to find a modification of the contract to exclude "storage" in a certain bulletin of the Company dated October 31, 1941 (Record 309), which in fact was wholly inapplicable to the transaction, and which Plaintiff Swalley had never assented to and which the record indicates he had never received (R. 111-112), and notwithstanding the absence of a new consideration, the failure of Defendant Company to affirmatively plead modification as required by the Federal Rules of Civil Procedure, and its invalidity under the Statute of Frauds of Ohio.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment herein in question under and by virtue of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229 (28 U.S.C.A. Section 347 (a)).

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on October 31, 1946 (Record 376), and the petition for rehearing was denied on November 29, 1946 (Record 386).

THE QUESTIONS PRESENTED

1. May the Circuit Court of Appeals properly disregard and override decisions of the United States Supreme Court applicable to and governing the facts of this case?

2. May the Circuit Court of Appeals properly deny full faith and credit to the statutes, laws and decisions of the State of Ohio, which admittedly control the validity and interpretation of the contract in question?

3. May the Circuit Court of Appeals properly fail to accord comity to the statutes, laws and decisions of the State

of Ohio which admittedly control the validity and interpretation of the contract in question?

4. May the Circuit Court of Appeals properly disregard the Rules of Civil Procedure for Federal District Courts, promulgated by the United States Supreme Court?

5. May the Circuit Court of Appeals reverse a judgment for the Plaintiff on certain points not raised by the pleadings as required by the Rules of Civil Procedure for Federal District Courts, promulgated by the United States Supreme Court, and thereby preclude the Plaintiff from challenging the Defendant on said issues?

6. May the Circuit Court of Appeals properly disregard the decisions of other Circuit Courts of Appeal applicable to the facts of this case?

7. May the Circuit Court of Appeals, in interpreting the written agency contract prepared by Defendant Company, properly construe ambiguous words therein in favor of the Company, despite established rules of judicial construction, despite the practical construction of the parties, and despite the Company's own admission in its pleadings in favor of Plaintiff Swalley's interpretation?

8. May the Circuit Court of Appeals, in interpreting the written agency contract prepared by Defendant Company, properly construe the word "use" therein to exclude "storage", despite established rules of judicial construction, despite the practical construction of the parties, and despite the Company's own admission in its pleadings that "use" includes "storage"?

9. May the Circuit Court of Appeals, in interpreting a standard form government contract, properly read into said contract the term "for storage" which does not appear therein?

10. May the Circuit Court of Appeals properly conclude that there was a modification of a contract, in the absence of any assent thereto by Plaintiff Swalley, in the absence of a new consideration, and where it affirmatively appears that the purported modification was embodied in a so-called bulletin of the Defendant Company which was not signed by Plaintiff Swalley, the party to be charged, as required by the Statute of Frauds of Ohio?

11. May the Circuit Court of Appeals properly deprive Plaintiff Swalley of commissions which he had already earned and of rights which had already accrued and become vested?

12. May the Circuit Court of Appeals properly impair the sanctity of a written contract by rewriting a new contract for the parties?

13. May the Circuit Court of Appeals properly disregard the controlling facts of this case and base its decision on certain judicial principles not applicable thereto?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals is in conflict with decisions of the United States Supreme Court.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with decisions of other Circuit Courts of Appeal.

3. The decision of the Circuit Court of Appeal fails to give full faith and credit to the statutes, laws and decisions of the State of Ohio, which admittedly control the validity and interpretation of the written contract in question.

4. The decision of the Circuit Court of Appeals fails to accord comity to the statutes, laws and decisions of the

State of Ohio, which admittedly control the validity and interpretation of the written contract in question.

5. The decision of the Circuit Court of Appeals overrides the Rules of Civil Procedure for the Federal District Courts, promulgated by the United States Supreme Court.

6. The Circuit Court of Appeals decided an important question of local law in conflict with applicable local decisions.

7. The Circuit Court of Appeals based its decision on certain points not presented by the litigants and which Petitioner Swalley was not given an opportunity to meet by the production of evidence.

8. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

PRAYER

Wherefore, your Petitioner, E. E. Swalley, prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket Number 8842, *E. E. Swalley, Plaintiff-Appellee, vs. Addressograph-Multigraph Corporation, Defendant-Appellant,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed and the judgment of the District Court be affirmed by this Court, and your Petitioner prays for such

other and further relief as to this Court may seem proper.

Dated this the 18th day of February, 1947.

HARRY B. COHEN,
A. BERKOWITZ,
Birmingham, Alabama,
Counsel for Petitioner E. E. Swalley.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, written by Judge Michael L. Igoe, appears on Pages 325-329 of the Record. It does not yet appear in the Federal Supplement.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (Circuit Judges Kerner and Minton, and District Judge Briggle), written by Judge Minton, appears on Pages 376-381 of the Record, and is reported in 158 Fed. (2d) 51 (Advance Sheet No. 1).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347 (a)).

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on October 31, 1946 (R. 376) and the petition for rehearing was denied on November 29, 1946 (R. 386).

Statement of the Case

To avoid unnecessary repetition, the petitioner respectfully directs the attention of this Court to the Summary Statement of Matters Involved on Pages 2-8 of the Petition for Certiorari, which is annexed hereto and made a part hereof.

Specification of Errors

It is respectfully submitted that the Circuit Court of Appeals for the Seventh Circuit erred in the following particulars, separately and severally:

1. The Court erred in reversing the judgment of the District Court.

2. The Court erred in so construing the term "use" in the written contract as to exclude "storage".

3. The Court erred in failing to give force and effect to the practical construction of the contract by the parties themselves (R. 265-266, 259-260).

4. The Court erred in failing to interpret the written contract prepared by Defendant Company most strongly against the Company and in favor of Plaintiff Swalley.

5. The Court erred in failing to give full faith and credit to the statutes, laws and decisions of the State of Ohio, which admittedly control the validity and interpretation of the contract in question.

6. The Court erred in failing to accord comity to the statutes, laws and decisions of the State of Ohio, which admittedly control the validity and interpretation of the contract in question.

7. The Court erred in holding that a certain bulletin of the Defendant Company dated October 31, 1941 (R. 309) applied to the transactions in question and constituted a practical construction of the contract by the parties.

8. The Court erred in basing its decision on the legal theory of modification of the written contract, where the Defendant Company did not plead modification in accordance with the Federal Rules of Civil Procedure promulgated by the United States Supreme Court, the case was not tried on that issue, and Plaintiff Swalley had no opportunity to introduce evidence on that point.

9. The Court erred in holding that the written contract of the parties was modified by a certain bulletin of the De-

fendant Company dated October 31, 1941, which in fact did **not** apply to the transactions in question.

10. The Court erred in holding that Plaintiff Swalley accepted the terms proposed in the bulletin of the Defendant Company dated October 31, 1941.

11. The Court erred in holding that the contract was terminable at will and could be modified at any time **by either party unilaterally** as a condition of its continuance.

12. The Court erred in holding that the bulletin of the Company dated October 31, 1941, was submitted to Plaintiff Swalley **as a condition** of the continuance of the contract.

13. The Court erred in holding, in effect, that the Defendant Company had the right to **partially** terminate the contract.

14. The Court erred in holding that Plaintiff Swalley is bound by a so-called "modification" of the contract embodied in a certain bulletin of the Company dated October 31, 1941, which was not signed by Plaintiff Swalley, the party to be charged, as required by the Statute of Frauds of the State of Ohio, the controlling law of the case.

15. The Court erred in holding that the Company's bulletin of October 31, 1941, constituted a modification of the written contract in the absence of any assent or approval by Plaintiff Swalley.

16. The Court erred in holding that the Company's bulletin dated October 31, 1941, constituted a modification of the written contract in the absence of a new consideration moving to Plaintiff Swalley.

17. The Court erred in depriving Plaintiff Swalley of his commissions which he had already earned under the contract in question.

18. The Court erred in depriving Plaintiff Swalley of his vested and accrued rights under the contract in question.

19. The Court erred in impairing the sanctity of the written contract between the parties.

20. The Court erred in rewriting a new and different contract for the parties, contrary to the terms of the written contract and contrary to the practical construction of the contract by the parties themselves.

21. The Court erred in failing to affirm the judgment of the District Court in favor of Plaintiff Swalley for the sum of $77,328.65 and costs of court.

Argument

Summary of Argument

The law of Ohio, which admittedly governs the interpretation of the written contract in question, and the decisions of the United States Supreme Court and of other Circuit Courts of Appeal require affirmance of the District Court judgment in favor of Plaintiff Swalley, because the contract was drafted by the Defendant Company, and ambiguous words therein must be construed against it.

The parties adopted a practical construction of the contract whereby the word "use" includes "storage".

The bulletin of the Defendant Company dated October 31, 1941, upon which the Circuit Court of Appeals relied, **did not, in fact,** apply to the transactions in question and did not constitute a practical construction of the contract operative in this case.

The decision of the Circuit Court of Appeals cannot properly be predicated upon the theory of modification of the contract, for Defendant failed to plead modification in accordance with the Federal Rules of Civil Procedure, the case was not tried on that issue, and Plaintiff Swalley did

not have an opportunity to introduce evidence on that point.

There was no effectual modification of the written contract applicable to the case at bar, because the Company bulletin in question **did not, in fact,** apply to the transactions in suit, there was no assent by Plaintiff Swalley, there was no new consideration moving to him, there is **no factual basis** for application of the rule that a contract terminable at will may be modified at any time by either party as a condition of its continuance, and the purported modification is invalid under the Ohio Statute of Frauds.

Plaintiff Swalley acquired vested rights to the commissions in question which could not be adversely affected by a later purported modification of the agency contract. His commissions accrued when the sale contracts were made, and were payable when the machines were shipped. The fact that the machines were delivered in instalments, and the purchase price paid on delivery, did not defer the accrual of his right to the commissions, and any intervening effort by Defendant Company to modify the contract could not deprive Plaintiff Swalley of those commissions which had already accrued. The bad faith and unjust enrichment on the part of Defendant Company require affirmance of the District Court judgment in favor of Plaintiff Swalley.

I. THE LAW OF OHIO, WHICH ADMITTEDLY GOVERNS THE INTERPRETATION OF THE WRITTEN CONTRACT IN QUESTION, AND THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OF OTHER CIRCUIT COURTS OF APPEAL REQUIRE AFFIRMANCE OF THE DISTRICT COURT JUDGMENT IN FAVOR OF PLAINTIFF SWALLEY.

By agreement of the parties embodied in the agency contract, the law of Ohio is the law that governs the interpre-

tation of the contract (R. 254). It is admitted that the written agency contract in question was prepared by Defendant Company and that Plaintiff Swalley did not participate in drafting it (R. 16, 7).

In *Sigman vs. Wurlitzer*, 57 Ohio App. 4, 11 N.E. (2d) 878, the law of Ohio was stated as follows.

> "The inducement having been accepted by appellee, the writing of appellant must be strictly construed against it for it could have restricted the existing implications by proper words of limitation. The appellee is entitled to the benefit of all reasonable inferences applicable to the words used.
>
> "In the case of any ambiguity, the law of Ohio is, as stated in *Knight vs. New England Mutual Life Insurance Company*, 57 N.E. (2d) 131, as follows: 'That he who writes must extend his opponent the most favorable, reasonable interpretation of the language implied, where ambiguity appears in what is written, is now accepted as a rule of construction of contracts.'"

This rule of construction has been reaffirmed and applied by Ohio courts in numerous cases, including the following:

> *Fire Association of Philadelphia vs. Agresta*, 115 Ohio St. 426, 154 N.E. 723;
>
> *Ferguson vs. Laux*, 57 Ohio App. 495, 15 N.E. (2d) 167, 169;
>
> *Coe vs. Suburban Light and Power Company*, 32 Ohio App. 158, 167 N.E. 693;
>
> *Charles Behlen Sons' Company vs. Ricketts*, 30 Ohio App. 167, 164 N.E. 436;
>
> *R. K. LeBlond Machine Tool Company vs. Humboldt Fire Insurance Company*, 6 Ohio App. 313, aff'd 92 Ohio St. 541, 112 N.E. 1084.

The United States Supreme Court and the various Circuit Courts of Appeal throughout the country have consistently and uniformly held that ambiguities in a writ-

ten contract must be resolved against the party who drafted the contract and selected its terminology. See, for example:

> *Grace vs. American Century Insurance Company*, 109 U.S. 278, 3 Sup. Ct. 207, 27 L.Ed. 932 (1883);
>
> *Noonan vs. Bradley*, 76 U.S. 394, 9 Wall. 394, 19 L.Ed. 757 (1870);
>
> *Calderon vs. Atlas S. S. Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L.Ed. 1033 (1898);
>
> *Metropolitan Casualty Insurance Company of New York vs. Banks*, 76 Fed. (2d) 68 (C.C.A. 3d, 1935);
>
> *Southern Railway Company vs. Coca-Cola Bottling Company*, 145 Fed. (2d) 304 (C.C.A. 4th, 1944);
>
> *Mount Vernon Refrigerating Company vs. Fred W. Wolf Company*, 188 Fed. 164 (C.C.A. 6th, Ohio, 1911);
>
> *Order of United Commercial Travelers of America vs. Sevier*, 121 Fed. (2d) 650 (C.C.A. 8th, 1941).

This is also the undisputed law throughout the United States. 17 C.J.S. "Contracts", Section 324, Page 751 et seq.

The Ohio Courts have had occasion to define the term "use" and "using" and the decisions support the contention of Plaintiff Swalley in this case.

In *Brown vs. Kennedy* (Ohio App.) 49 N.E. (2d) 417, 418 (1942), aff'd 141 Ohio St. 457, 48 N.E. (2d) 857 (1943), the Ohio Court of Appeals, considering the meaning of the words "use" and "using" in an automobile liability insurance policy, and holding the insurance company liable thereon, declared:

> "The general rule is, that language used in a policy of insurance being selected by the insurer should be construed most favorably to the insured, giving the language used its fair and reasonable meaning. 5 Am. Jur. 806, section 534; Couch on Insurance, Section 1175, Vol. 5, p. 4175; 22 Ohio Juris. 339, 340, sections 184, 185; Duncan v. John Hancock Mutual Life

Ins. Co., 137 Ohio St. 441, 445, 31 N.E. 2d 88.

"This rule as applied to a case where the insurer claims a limited interpretation of the terms 'use' or 'using' would seem to mean that where the terms 'use' or 'using' are employed in the policy, and there are included within their fair definition and interpretation words or meanings which would attach liability or defeat it, the terms employed should be given the recognized fair and reasonable meaning which causes liability under the policy to attach.

"In the instant case the terms in question are 'use' and 'using.' Now a car would be used by a person, whether it was operated personally or through the services of another. If the insurer meant that liability should only attach when it was being operated or driven by the owner or some one with his consent, and it is claimed the word 'used' includes the term 'operated' —then the insurer should have employed the word carrying in its meaning the narrower limitation of liability.

"The word 'use' is defined as the 'Purpose served —a purpose, object or end for useful or advantageous nature.' (Oxford English Dictionary.)"

On appeal the Supreme Court of Ohio affirmed the decision of the Ohio Court of Appeals and stated at Page 860 of 48 N.E. (2d) as follows:

"We agree with the Court of Appeals that the words 'using,' 'used,' and 'actual use' do not have the limited meaning of 'operating,' 'operated,' or 'actual operation.' The defense that Bennett White was driving does not negative the fact that Dorothy Kennedy was using the automobile."

In Buell vs. Indian Refining Company, 62 Ohio App. 108, 23 N.E. (2d) 329, 331, the Ohio Court of Appeals pointed out that **the word "use" is one of the most comprehensive words in our language and is capable of being used in many senses.**

A search for definitions of the word "use" in dictionaries, in *"Words and Phrases"*, and in 66 *C.J. "Use"*, at p. 65 et seq., reveals that the term is suspectible of **many** shades of meaning. In *Webster's New International Dictionary* (*2nd Ed.* 1935), one of the definitions of the noun "use" is as follows:

> **"6. Quality of being suitable for employment, capability of being used or of serving to promote an end * * *."**

In view of the fact that the written contract in question was a regular printed form contract drafted by the Defendant Company, and in view of the fact that the word "use" employed therein is susceptible of different meanings, and can reasonably be construed in favor of Plaintiff Swalley, it is submitted that such construction should prevail and that the decision of the Circuit Court of Appeals is in direct conflict with the decisions of the United States Supreme Court and other Circuit Courts of Appeal throughout the country, and also with the law of Ohio and other States.

II. THE PRACTICAL CONSTRUCTION OF THE CONTRACT BY THE PARTIES REQUIRES AFFIRMANCE OF THE DISTRICT COURT JUDGMENT IN FAVOR OF PLAINTIFF SWALLEY.

In its opinion the Circuit Court of Appeals declared (R. 380):

> "No sounder guide to the contracts' meaning can be found than the interpretation of the parties themselves."

In applying this familiar legal principle, however, the Court overlooked the all-important and decisive fact that the Defendant Company itself had already actually inter-

preted the split-commission clause of the contract in accordance with the contention of Plaintiff Swalley in the case at bar, and that both parties had acted in reliance thereon.

The attention of this Court is respectfully directed to an exchange of letters between the parties, the letter from Swalley to the Company being dated May 10, 1941 (R. 265-266), and the letter in reply from the Company to Swalley being dated May 26, 1941 (R. 259-260), **These letters are not even referred to in the opinion of the Circuit Court of Appeals and were apparently not considered by the Court in arriving at its conclusions.**

It will be noted from Swalley's letter that he claimed commissions on certain machines and attachments (like those involved in the present suit) which had been stored in their original packing crates at Barksdale Air Field, Shreveport, Louisiana (located in the territory of another agent), and which had later been transferred to Selma Air Field, Selma, Alabama (located in Swalley's territory). In its reply, the Company expressly denied Swalley's right to the commissions on the ground that the machines and attachments which had been shipped direct from the factory to Barksdale Field had not been transferred to Swalley's territory until **after** they had remained at Barksdale Field for more than ninety days, **and the Company made it clear that it is wholly immaterial that the equipment had not, in fact, been "used" but had been merely stored while it remained at Barksdale Field.**

The pertinent parts of the Company's letter are as follows (R. 259-260):

> "When that equipment was sold, the Dayton Multigraph Agency received its split sale share for obtaining the order and the remaining commission was credited to Mr. Carter who was then Multigraph Agent

at Dallas in whose territory Shreveport is located.

"From this it will be seen that equipment was moved from Shreveport into Selma, Alabama, considerably **after the 90 day period expired.** By that is meant the time limit that is placed on equipment transferred from one territory to another which are to be considered as bonus orders or split sales. In that connection, we would refer you to the Manual Section 11, Paragraph 28, which contains the regulations on deals of this kind.

"Although an equipment after being shipped from the Factory into one territory and it remains in that territory **even though it may not be used,** and if that equipment is transferred to another territory **after 90 days** from date of sale, under the regulations there would be no split sale or adjustment of commissions or quota. We wish to add, too, that the vacuum frame and whirler were sold as open market items with those two items being shipped to the Government forces in the San Antonio area and from there it was re-shipped to Shreveport. This only indicates that with the Government, it can be expected that there will be more or less moving of their equipment.

"Now if the reverse were true and the Class 1200 Multilith you sold for delivery to them at Selma, last April was shipped out by them **after 90 days** from date of sale, you of course would be entitled to retain the full commission and quota credit on the deal you received. (Boldface supplied.) (Selma was located in Plaintiff Swalley's territory.)

The Defendant Company and Plaintiff Swalley acted in reliance upon that interpretation of the contract, and continued to do so until the present controversy arose (R. 113). The main purchase order in question was placed on March 31, 1942 (R. 281) and the other two orders were placed pursuant to requisitions dated May 6, 1942 (R. 289 and 295). On May 7 and 8, 1942, the Defendant Company,

in a spirit of elation, sent Plaintiff Swalley four congratulatory telegrams regarding his early election to the 1943 Hundred Club because he had already exceeded his agency quota for the year (R. 261 and 262). The Company thereby recognized and acknowledged that Swalley's rights to the commissions had already accrued for his quota credits included the commissions claimed in this suit.

When Plaintiff Swalley was about to enter the military service, the Defendant Company sent its special representative, T. H. White, to make certain arrangements. The Record (125-126) shows that White inserted the following paragraph in a letter to the Company dated March 18, 1943, about the machines and attachments involved in this suit (R. 257):

> "The equipment mentioned was delivered to Mobile Air Depot within the limits of the territory described in our contract, has been fully paid for, and has remained beyond the ninety-day period as required by contract".

The Company's answer (R. 258) did not deny that statement.

In its pleadings in the present suit (R. 24) Defendant Company averred that Plaintiff Swalley "was entitled to receive, and was paid, seventy-five per cent of the commission on machines shipped into the Mobile Air Depot for storage under Purchase Order No. (535) 42-15979 which were subsequently placed in use by the Defendant in the territory described in the contract between the Plaintiff and the Defendant." **Hence the Company admits that the words "to be used" in the contract include "for storage."** As Swalley's rights to the commissions in question accrued at the time that the sale contracts were made, and could not be divested except by operation of the *condition*

subsequent of the 90-day clause, it is, of course, immaterial whether the equipment was ultimately placed in operation.

The fact that the 90-day clause (R. 249-250) states that *in the event* of the named contingency, viz, transfer of equipment from one territory to another within 90 days, the commission "shall be *readjusted*", and the fact that the Company's letter of May 26, 1941 (R. 259-260) points out that if this contingency does not occur the agent may "*retain*" his commission clearly indicate that the 90-day clause presupposes that the split commission has already been paid pursuant to the preceding sentence. Thus the 90-day clause is a *condition subsequent*, and it is obvious that the parties so construed it, especially in view of the fact that commissions were paid or credited at the time of *shipment* (R. 247, 113).

Moreover, the fact that the 90-day clause contains the words "*new or used equipment*" is cogent proof that the parties contemplated that some equipment might be transferred within 90 days while still brand-new or unused, that is, while still in *storage*. As the clause applies to both new and used equipment its only effect is to set a 90-day time limit for operation of the condition subsequent, viz, transfer to another territory. This is exactly the way the Company itself construed the contract (R. 259-260).

In view of the clear, unmistakable and unequivocal interpretation and practical construction of the written contract by the parties *inter se*, it is respectfully submitted that recourse to judicial construction or to lexicographers was unwarranted to determine the intention of the parties in regard to the transactions in suit, and the conclusion is inescapable that Plaintiff Swalley is entitled to recover the commissions awarded by the District Court.

III. THE BULLETIN OF THE DEFENDANT COMPANY RELIED UPON BY THE CIRCUIT COURT OF APPEALS DID NOT IN FACT APPLY TO THE TRANSACTIONS IN QUESTION AND DID NOT CONSTITUTE A PRACTICAL CONSTRUCTION OF THE CONTRACT OPERATIVE IN THIS CASE.

The Circuit Court of Appeals relied strongly on a certain bulletin issued by Defendant Company on October 31, 1941 (R. 309). Examination of the bulletin in question will conclusively show that it has nothing at all to do with the facts of the instant case, that it does not even purport to interpret the written contract in question as to the particular transactions involved in this suit, and that it does not adversely affect the right of Plaintiff Swalley to recover his commissions earned under the contract.

(a) In the first place, it should be noted that the subject matter of the bulletin is "Mobile Army Units". It does not purport to cover any other subject and it is expressly restricted to that one subject by the printed instructions on the face of the bulletin: "Identify subject in space provided. Write on one subject only and sign the letter." The contents of the bulletin repeatedly refer to "combat units" and it is obvious that the subject "Mobile Army Units" has no reference to the City of Mobile, Alabama, where the Mobile Air Depot is located in the Plaintiff's territory, but to a certain type of Army unit of the U. S. Engineers.

(b) It should be noted further that the bulletin refers solely to **Multilith** equipment for use of the **U. S. Engineers.** As a matter of fact, most of the machines which are involved in this suit were not Multilith equipment but **Multigraph** machines, and only one particular type or model of Multilith was ever used in mobile Army units or trailers.

Moreover, the machines and attachments involved in this case were **not** for the use of the U. S. Engineers, but for the use of the **Air Corps**, an entirely different branch of the military service.

(c) This Court's attention is also directed to the fact that the bulletin states: "When equipment is shipped from the Factory to an Army General Depot, it is considered as 'in transit'." Thus, the bulletin expressly restricts itself to shipments from the factory to **Army General Depots** and has nothing at all to do with shipments to **other depots**, like the **Mobile Air Depot**, which are **not** in fact Army General Depots.

(d) It should be noted that the bulletin refers to purchases by the War Department procured by a Washington representative of the Company, whereas the purchases of the machines involved in this suit were made by the Air Corps at Wright Field, Dayton, Ohio, and the orders were procured by the Company's agent, Gray, in Ohio, according to the Company's own admission (R. 17-21).

(e) It is apparent that the Defendant Company itself did not regard the bulletin of October 31, 1941, as applicable to or controlling in situations like that in the case at bar, for the Company found it necessary or advisable to issue a bulletin on September 21, 1942 (R. 302), which purported to cover the situation precisely, but which came too late to affect Plaintiff Swalley's rights to the commissions in question. Issuance of the second bulletin was recognition by the Defendant Company of the fact that the first bulletin was **inapplicable and ineffectual**, either as an **interpretation** of the written contract with respect to the purchase orders in question, or as a purported **modification** of the written contract.

(f) Further cogent proof of the fact that the Company itself did not intend for the bulletin of October 31,

1941 to apply to the transactions in question lies in the acts and conduct of the parties subsequent thereto. See supra, pp. 23-25.

(g) The record is devoid of any evidence that the parties hereto had acted in reliance on that bulletin, or had adopted a new construction of the contract in conflict with their previous construction (R. 265-266, 259-260). The Middletown transaction does **not** support the decision of the Circuit Court of Appeals because it does **not** appear from the record that the machine had remained at Middletown, Pennsylvania for the required period of 90 days.

In view of these circumstances, therefore, the Company bulletin of October 31, 1941, should be completely disregarded in deciding this case. The bulletin amounted to nothing more than a special arrangement for splitting commissions in a certain narrow and restricted situation entirely foreign to the circumstances of this case. Since the bulletin was narrowly limited by its own terms and, since it was prepared by the Defendant Company itself, it must be strictly construed against the Company and confined to its own narrow field of operation. In giving to this limited bulletin the effect of overriding the provisions of Paragraph 8 of the contract (R. 248) and the practical construction thereof by the parties, the decision of the Circuit Court of Appeals is in conflict with rules of judicial construction recognized generally by courts throughout the country.

IV. THE DECISION OF THE CIRCUIT COURT OF APPEALS CANNOT PROPERLY BE PREDICATED UPON MODIFICATION OF THE WRITTEN CONTRACT, FOR THE DEFENDANT COMPANY FAILED TO PLEAD MODIFICATION IN ACCORDANCE WITH THE FEDERAL RULES OF

CIVIL PROCEDURE, THE CASE WAS NOT TRIED ON THAT ISSUE, AND PLAINTIFF SWALLEY DID NOT HAVE AN OPPORTUNITY TO INTRODUCE EVIDENCE ON THAT POINT.

The Rules of Civil Procedure for the District Courts of the United States were promulgated by the United States Supreme Court. Rule 8 deals with "General Rules of Pleadings". Subdivision (c) entitled "Affirmative Defenses" provides:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res julicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense * * *"

Rule 12 (h) provides that a party **waives** all defenses and objections which he does not present either by motion or in his answer or reply.

Numerous Federal cases have applied and enforced these requirements. See 28 U.S.C.A. following Sec. 723 (c), note 21, and U.S.C.A. 1947 Special Pamphlet, p. 172 et seq.

Since modification of a contract is clearly a matter constituting "an avoidance or affirmative defense," it must be set forth **affirmatively. This the Defendant Company failed to do**, as an examination of the pleadings will show. The only references to the bulletin of October 31, 1941, appear in Paragraphs 8 and 10 of Defendant's Answer (R. 18 and 21). Paragraph 8 purported to answer Paragraph 6 of the Complaint, which alleged that Plaintiff had **sold** certain machines, and the bulletin was referred to by the Defendant to show that Plaintiff had not sold the ma-

chines. Paragraph 10 purported to answer Paragraph 8 of the Complaint, which dealt only with attachments, and not the machines (R. 9).

Nowhere in its pleadings does the Defendant Company use the word "modification" or aver facts to show that the original contract was modified. The Defendant was obviously trying to plead practical construction of the contract and not modification.

Paragraph 7 of the Complaint (R. 8-9) alleged that pursuant to the agency contract and the Air Corps purchase orders in question, the Defendant delivered to the Mobile Air Depot 75 Multigraph models and 86 Multilith models, for which the Defendant received $357,886.90. Paragraph 10 of the Complaint (R. 9 and 11) claimed the sum of $85,244.46 under the agency contract and the main purchase order in question. It is significant that in its answers thereto, the Defendant Company did not even mention the bulletin in question or endeavor to show a modification of the contract. As a matter of fact, in its answer to Paragraph 7 of the Complaint (R. 19-20), Defendant Company referred to the contract, marked Plaintiff's Exhibit "A," as "being Plaintiff's contract with the Defendant"; and in its answer to Paragraph 10 of the Complaint (R. 23-24), the Defendant set out **and relied upon** Paragraph 8 of the contract.

At the trial of this case Plaintiff's evidence was submitted by deposition as he was then on the high seas with the U. S. Navy. Due to the fact that Defendant Company did not plead modification of the contract and Plaintiff was not duly apprised of such defense, and due to the fact that the case was not tried on that issue, Plaintiff Swalley did not have an opportunity to meet that point by introducing evidence. Plaintiff respectfully submits, therefore, that the decision of the Circuit Court of Appeals, predicated upon a

so-called "modification" constitutes an injustice toward him, for he was thereby deprived of an opportunity to be heard, which is the essence of due process. If he had been duly apprised that the Defendant or the Circuit Court of Appeals would rely upon a so-called "modification" of the contract, he would have offered to prove, *inter alia*, that the Company had actually paid him a commission on a June 6, 1942 invoice where the machine had been shipped pursuant to one of the purchase orders in question and had remained in his territory more than 90 days, **even though it was not in fact installed or used during that period**; and, further, that he had regularly twice a month submitted to the Company, in compliance with its rules, certain "I and E" (Income and Expense) reports in which he claimed credit for commissions on all the machines that were required to be shipped to Mobile Air Depot under the three purchase orders in question, and the Company never disputed the correctness of nor made any complaint about said reports.

V. THERE WAS NO EFFECTUAL MODIFICATION OF THE WRITTEN CONTRACT APPLICABLE TO THE CASE AT BAR.

(a) The Defendant's bulletin of October 31, 1941, upon which the Circuit Court of Appeals based a so-called modification of the contract, **did not**, in fact, apply to the transactions in question for the reasons stated on pages 26-28 of this Brief.

(b) There was no evidence showing that Plaintiff Swalley had assented to or acquiesced in the proposed terms of the Company set forth in the bulletin, nor was there any evidence of acts or conduct of the parties in reliance thereon which might afford a basis for modification.

(c) There was **no new consideration** moving to Plaintiff Swalley. It is well-established that since a modifi-

cation of a contract is a **new** contract, a consideration is necessary to support the new agreement, and this is the law of Ohio, which governs the contract in question: *Thurston vs. Ludwig*, 6 Ohio St. 1, 67 Am. Dec. 328; *Marshall vs. Ames*, 11 Ohio Cir. Ct. 363, 5 Oh. Cir. Dec. 403; *Williams vs. Fortlage*, 17 Oh. Cir. Ct. N.S. 242. This rule has also been recognized and applied by the Federal Courts, *Cuneo Press vs. Clayborn Corporation*, 90 Fed. (2d) 233 (C.C.A. 7th, 1937), and is the prevailing law throughout the country, 17 C.J.S. "Contracts", Sec. 376, p. 861 et seq.

As no new consideration was shown, the purported modification lacks legal validity and cannot support the decision of the Circuit Court of Appeals.

(d) There is no **factual** basis for application by the Circuit Court of Appeals of the rule that a contract, terminable at will, may be modified at any time by either party as a condition of its continuance.

It should be noted that the contract provided that it may be terminated at any time at the option of either party **by and upon the giving of written notice** (R. 253).

As stated in 17 *C.J.S. "Contracts"* Sec. 402, p. 892:

> **"Notice of termination is essential to the exercise of an option to terminate a contract. * * * Notice to terminate a contract, under a provision therein must be reasonable, clear and unequivocal, and in accordance with the terms of the contract. * * *"**

There was no effort by Defendant Company to **terminate** the contract and there was no evidence that continuation of the contract was **conditioned** upon acceptance by Plaintiff Swalley of the terms of the bulletin. The fact that Defendant Company finally exercised its option to terminate the contract by written notice dated March 5th, 1943, when Plaintiff Swalley entered the military service

(R. 255, 257) proves that the Company itself recognized that in order to terminate the contract it was necessary to give written notice to that effect.

Williston on Contracts (Rev. Ed. 1938) Sec. 1027A, p. 2854 fn, points out the distinction between (1) a privilege to terminate a contract "at will" and (2) a privilege to terminate a contract at any time which requires a particular manifestation of its exercise, such as written notice.

In Abrams vs. George E. Keith Company, 30 Fed. (2d) 90 (C.C.A. 3rd, 1929), the Court stated:

> "This contract was perfectly good in law. Being indefinite as to its terms, either party might terminate it on reasonable notice. **No such notice was given here.** The plaintiff treated the contract as wholly invalid, arbitrarily sought to terminate it without notice, and insists on its rights so to do here. The case was clearly one for the jury to determine what the facts were. If the facts were as the counterclaim avers, the plaintiff was guilty of a breach of the contract, and defendants were entitled to recover such damages in its counterclaim as the evidence warranted."

In *Berwick Hotel Co. v. Vaughn*, 300 Pa. 389, 150 Atl. 613, 616, 71 A.L.R. 1340 (1930), the Court declared:

> "To be effective, a notice for the rescision or termination of a contract must be clear and unambiguous, conveying an unquestionable purpose to insist on the cancellation. And where the conduct of one having the right to rescind a contract is ambiguous and it is not clear whether he has rescinded it or not, he will be deemed not to have done so. Under this rule, **a mere threat to cancel the contract is not sufficient as a notice of rescision.** 3 Black on Rescision and Cancellation, Section 574." (Boldface supplied.)

It should be noted that the termination clause of the contract (R. 253) provided that the Company, at any

time, may change the boundaries of Plaintiff's territory. Is this not cogent proof that a modification of **other terms** of the contract, such as the commission arrangement, could **not** be effected by the Company **unilaterally** by written notice?

The bulletin amounted to nothing more than a mere proposal by the Company for a new commission arrangement in certain special instances. To hold that it constituted notice of termination of the contract not only does violence to the facts, but also brings the case within the operation of the rule of law which precludes **partial** termination of a contract. 17 *C.J.S.* "Contracts", Sec. 403, p. 893.

In *Oil Workers International Union Local No. 463 vs. Texoma Natural Gas Company*, 146 Fed. (2d) 62, 64 (C.C.A. 5th, 1945) cert. den. 324 U.S. 872, 65 Sup. Ct. 1017, 89 L.Ed. 1426, the Court held:

> "A party to an agreement may exercise his option to cancel it, but he may not, when unauthorized by the agreement and in the absence of consent of the other party, cancel it **in part**." (Boldface supplied.)

Thus, even considered as a notice of termination, the bulletin is a legal anomaly and has no validity.

(e) The purported modification of the written contract was invalid under the Statute of Frauds because it was not in writing signed by Plaintiff Swalley, "the party to be charged therewith."

The Ohio Statute of Frauds, embodied in Sec. 8621 of Throckmorton's Annotated Code of Ohio (1930), provides as follows:

> "No action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought,

or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Examination of the agency contract with respect to expenses (R. 250), insurance, (R. 250), purchase or lease of machines (R. 251) and the two-year no-competition clause (R. 252) leaves no room for doubt that the parties contemplated a **permanent** arrangement reasonably requiring more than a year for performance, and hence the contract was **required** to be in writing under the line of cases supporting the following text in 37 *C.J.S.*, *"Statute of Frauds"*, Sec. 52, pp. 567-568:

> "* * * Where from the nature and terms of the contract it is manifest that the parties intended to enter into a permanent arrangement, or that they did not contemplate a complete performance within a year, the contract is within the Statute, although no time for performance is specified, and even though there is a mere possibility of performance within a year. * * * The fact that one or both of the parties have the privilege of terminating the agreement before the expiration of the year does not take the contract out of the Statute".

As the original contract was **required** to be in writing, the purported modification was also **required** to be in writing, signed by Plaintiff Swalley. In 49 *Am. Jur. "Statute of Frauds"*, Sec. 301, p. 609, the rule is stated as follows:

> "* * * The broad general doctrine as announced by most authorities is that a contract required by the statute of frauds to be in writing cannot be validly changed or modified as to any material condition therein by subsequent oral agreement so as to make the original written agreement as modified by the oral one an enforceable obligation. To state the rule differently, where an original agreement comes within the provisions

> of the statute of frauds requiring certain agreements to be in writing, the statute of frauds renders invalid and ineffectual a subsequent oral agreement changing the terms of the written agreement."

This is the law of Ohio and the Federal courts. *Crawford vs. Wick,* 18 Ohio St. 190, 98 Am. Dec. 103; *Swain vs. Seamens,* 9 Wall (U. S.) 254, 19 Law Ed. 554; *Emerson vs. Slater,* 22 How. (U. S.) 28, 16 Law Ed. 360; *Parish vs. Haynes,* 62 Fed. (2d) 105 (C.C.A. 5th).

Moreover, the fact that the bulletin required fulfillment of the Company's one-year guarantee from date of future delivery or installation (R. 311, 24), shows that the purported modification itself was not to be performed **within** one year, and hence is invalid under the Statute of Frauds, because not executed by Plaintiff Swalley, the party to be charged therewith.

VI. PLAINTIFF SWALLEY ACQUIRED VESTED RIGHTS TO THE COMMISSIONS IN QUESTION WHICH COULD NOT BE ADVERSELY AFFECTED BY A LATER PURPORTED MODIFICATION OF THE AGENCY CONTRACT.

The Circuit Court of Appeals relied solely on the bulletin of October 31, 1941 (R. 309) to support its theory of modification, but for the reasons stated above, pp. 31-36, that bulletin did not create a valid modification of the written contract. In recognition of this fact, the Company issued a second bulletin dated September 21, 1942 (R. 302). As the second bulletin obviously came too late to affect Plaintiff Swalley's right to recover the commissions in question, the Circuit Court of Appeals did not even refer to it.

The same grounds which vitiate the first bulletin (supra, pp. 31-36) also vitiate the later bulletin, but there

are additional factors which render it a legal nullity as to the transactions in question.

In the first place, it purports to cover only **one** of the three purchase orders involved in this suit (R. 302).

It is important to bear in mind that the agency contract was entered into March 25, 1941 (R. 254), that the 90-day clause was interpreted in Swalley's favor by the Company itself in the letter of May 26, 1941 (R. 259-260), that the Air Corps contracts for the machines in question were made on March 31, 1942, May 18, 1942, and May 20, 1942 (R. 281, 289, 295), that shipments were commenced prior to July 1, 1942, and that Swalley's rights to commissions on the machines to be shipped to Mobile Air Depot **had already accrued** before the bulletin of September 21, 1942, was issued (R. 302).

We urge the Court to note that **each of said orders contained shipping instructions directing that a certain number of the particular type of machines described therein be shipped to Mobile Air Depot, at the prices stipulated**, in accordance with the monthly delivery schedule **beginning on or before July 1, 1942**. The Company had entered into a **binding contract** with the Air Corps in regard to the machines and attachments in question and had actually made shipments and deliveries as required. The commissions were earned and Swalley's rights accrued at the time the sale contracts were made, and, in fact, commissions were paid to Swalley at the time the machines were **shipped** from the Factory, until the present controversy arose (R. 247). The Company did not wait for the machines to be installed or used before collecting the purchase price from the Government, nor did the Company wait for the machines to be installed or used before paying Swalley's commissions, until the controversy of this suit arose.

Therefore, Swalley had an accrued right and in-

terest in the War Department contracts in question, and the Company was legally impotent to modify the agency contract in so far as those accrued rights were concerned.

In the law of agency, it is well-established that an agency, **coupled with an interest,** is **not** revocable by the principal, and in the field of contracts, it is equally well-established that, although a contract terminable at will can be modified at any time by either party as a condition of its continuance, nevertheless, such modification must look to the **future** and cannot affect the **past** and, consequently, where an agent has already earned his commission or the company is already under a legal obligation to pay him his commission, it cannot be changed without his consent or without a new consideration.

As stated in 3 *C.J.S.* "Agency", Sec. 187, p. 88:

> "The rule that the agent is entitled to recover for services rendered before his discharge is particularly applicable where contract of agency is severable. **Accordcordingly, an agent, selling goods on a commission is entitled to a commission on goods sold by him during the continuation of the agency, although the goods were not delivered or paid for, or even where the orders were not received by the principal, until after the termination of the relationship—"** (Boldface supplied.)

To the same effect is 2 *Am. Jur.*, *"Agency,"* Sec. 50.

In *Peoria Life Insurance Company vs. Poynor* (Tex. Civ. App.), 297 S.W. 788, the Court declared that irrespective of an agreement that the agent would abide by the rules of the company, the principal, by changing its rules, cannot alter the compensation fixed by the contract of agency, for an agent's vested rights under an express contract cannot be changed by rules and regulations of the principal.

This same principle was recognized in *Schnerb vs. Caterpillar Tractor Company*, 43 Fed. (2d) 920, cert. den. 282 U. S. 898, 75 Law Ed. 791 wherein the Court stated that although a manufacturing company, under an agreement giving an agent exclusive territory without fixing the term of duration, could cancel their obligation thereunder at any time by notice, **such termination would not affect business already in negotiation.**

It is highly significant that, by its own admissions, the Company set aside certain sums of money in a special fund to cover the commission on the machines in question and the money was carried on the books of the Company as a **liability** (R. 157, 193). Thus the Company itself recognized that the right to the commissions had **accrued** and that it was simply a matter of disbursing the funds.

In *Atkinson vs. The New Britain Machine Co.*, 154 Fed. (2d) 895, 901 (C.C.A. 7th, 1946), the Court said:

> "We are of the view that unless there is an agreement clearly providing to the contrary, a person selling on a commission basis is entitled to a commission **when a sale is made irrespective of when shipment takes place."**

To the same effect is *Dibble vs. Dimick*, 143 N. Y. 549, 38 N.E. 724, where the commissions were not payable until the delivery of the goods. See also *A.L.I. Restatement on Agency*, Sec. 436, comment (a).

In *Ohio Marble Co. vs. Byrd*, 65 Fed (2d) 98 (C.C.A. 6th, 1933) the Court held that an agent was entitled to recover commissions upon shipments made pursuant to sales contract, even though said shipments occurred **subsequent to** the termination of his agency, and the commissions did not **become due** until after the agency terminated.

In *Albright vs. Kalbitzer*, 2 Fed. Supp. 815 (D.C. Pa., 1945), the Court held that under a manufacturer's contract

to pay commissions to a distributor on "sales", delivery and passing of title were **not** necessary to existence of a "sale" on which a commission would be due.

In *Jacquin vs. Boutard,* 89 Hun. 437, 35 N. Y. Supp. 496 (1895) affirmed in 167 N.Y. 686, 51 N.E. 1091 (1898), it was held that the agent could recover commissions which he would have earned up to the end of the six-month termination period, **including those on sales for future delivery.**

In *Dildine vs. Ford Motor Company,* 159 Mo. App. 410, 140 S.W. 627 (1911), the Court held that a dealer could recover his 15% commission on a car that he had ordered, where the manufacturer agreed to ship the car but later returned the deposit and refused to ship the car, even though the contract expressly gave the manufacturer the right to change prices and the dealer the right to cancel the order in the event of such change.

In *Singer Sewing Machine Co. vs. Brewer,* 78 Ark. 202, 93 S.W. 755 (1906), it was held that an agent is entitled to commissions for sales upon which installments remained unpaid at the time the agency contract was terminated, where the sales were largely on an installment basis, and the agent was not limited to commissions on installments actually paid at the time of the termination.

In *Wilcox & Gibbs Sewing Machine Company vs. Ewing,* 141 U. S. 627, 637, 12 Sup. Ct. 94, 35 Law Ed. 882 (1891), the United States Supreme Court declared:

> "Of course, the revocation by the principal of the agent's authority could not injuriously affect the contracts made by the latter under the power originally conferred upon him."

Hence, the fact that some of the machines and attachments under the three purchase orders in question were shipped by the Company to Mobile Air Depot after issuance

of the bulletin of September 21st, 1942, and after termination of the agency contract on March 18, 1943 (R. 255, 257, 280), **cannot lawfully deprive Plaintiff Swalley of his commissions which accrued at the time of the sale.**

It is ironical, indeed, that although the commissions sued for were set aside by the Company in a special fund and carried on the Company's books as a **liability** (R. 157, 193), and the purchase price of the machines paid by the Government undoubtedly included Plaintiff Swalley's commissions, **said commissions have not in fact been paid by the Company.** It is submitted that such conduct on the part of the Company constitutes **bad faith** not only toward Plaintiff Swalley and the other agents, but also toward the United States Government, which should not be countenanced by this Court.

I*n Tahir Erk vs. Glenn L. Martin Co.*, 116 Fed. (2d) 855 (C.A.A. 4th, 1941), the Court held, in an agent's action for breach of a military airplane sales agency contract, that notwithstanding a mutual revocation clause in the contract, the complaint stated a good cause of action on the theory that the principal cancelled the agency **in bad faith** for the purpose of depriving the agent of his commissions.

I*n Bach vs. Friden Calculating Machine Co.*, 165 Fed. (2d) 361 (C.C.A. 6th, 1946), where the manufacturer of calculating machines required its distributors to buy an inventory of obsolete machines in a bad state of repair which the distributors did not want and could not use, and the distributors were required to build up a business of their own as independent purveyors of the machines in a certain territory, the Court held that the contract was **not** terminable at the will of the manufacturer.

The requirement of **good faith** was recognized by the United States Supreme Court in *Crowe vs. Trickey*, 204 U. S. 228, 27 Sup. Ct. 275, 51 Law Ed. 454.

The doctrine of **unjust enrichment** has also been invoked by courts to protect an agent against the arbitrary exercise by his principal of an option to terminate the agency "at will". *Erskine vs. Chevrolet Motors Co.*, 185 N. C. 479, 117. S.E. 706, citing *Manhattan Life Ins. Co. vs. Buck*, 93 U. S. 24, 23 Law Ed. 789.

The fact that the Company actually received from the Government the sum of $291,899.87 on the machines and attachments in question, which included the agents' full 35% commissions of $102,164.95, yet the Company paid Swalley only $6,324.94 of his share (75%) of the commissions, and refused to pay Agent Gray of Dayton, Ohio, any of his share (25%) until after he sued for same (R. 329, 192, 193)—these facts are devastating proof of the **bad faith and unjust enrichment** on the part of the Company. As stated in *Fichter vs. Milk Wagon Drivers' Union*, 382 Ill. 91, at pp. 95-99, 46 N.E. (2d) 921, 924 (1943):

> "We have been referred to no case and we believe none can be cited which authorizes one party to a contract which is in the course of performance to create a situation which changes the vested rights of the parties and then contend that the situation thus brought about creates the bona fide dispute which will authorize the payment of a lesser sum in satisfaction of a greater."

In view of the facts of this case and in view of the foregoing legal authorities, it is, therefore, clear that Plaintiff Swalley acquired **vested rights** to the commissions in question at the time of the **sale** of the machines and attachments, and that under the agency contract he could not thereafter be deprived of his commissions except by operation of the **condition subsequent** contained in the 90-day clause of Paragraph 8 (R. 248-249). As the District Court found, as a fact, that the machines and attachments had re-

mained in his territory over 90 days and had been fully paid for, and that the commissions in suit have not been paid to anyone else, it is respectfully submitted that justice and adherence to sound legal principles applicable to the undisputed facts of this case require affirmance of the District Court judgment in favor of Plaintiff Swalley.

Conclusion

As the decision of the Circuit Court of Appeals is clearly erroneous and in conflict with the controlling law of Ohio and decisions of the United States Supreme Court and other Circuit Courts of Appeal, and as it overrides the practical construction of the contract by the parties themselves, disregards the Federal Rules of Civil Procedure, and can find no legal support in the theory of contract modification, your Petitioner E. E. Swalley humbly prays that the grievous error of the Circuit Court of Appeals be rectified and that the judgment of the District Court in his favor be affirmed.

Respectfully submitted,

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February 18, 1947.